

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

TECHNICAL ANALYSIS

Proposed Administrative Civil Liability
Contained in Complaint No. R9-2003-270
Pioneer Builders, Inc.

Noncompliance with Order No. 99-08-DWQ,
Cleanup and Abatement Order No. R9-2003-158,
and
Water Quality Control Plan, San Diego Basin (9) (Basin Plan)
Waste Discharge Prohibition No. 1

June 12, 2003

by
Rebecca Stewart
Sanitary Engineering Associate
Compliance Assurance Unit

1. INTRODUCTION

This technical analysis provides a summary of factual and analytical evidence supporting administrative assessment of civil liability in the amount of \$139,800 against Pioneer Builders, Inc. for violations of State Water Resources Control Board Order No. 99-08-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated With Construction Activity*, Cleanup and Abatement Order No. R9-2003-158, and the Water Quality Control Plan, San Diego Basin – Region (9) (Basin Plan) as alleged in Complaint No. R9-2003-270.

2. ALLEGATIONS

The following allegations against Pioneer Builders, Inc. are the basis for assessing administrative civil liability and also appear in Complaint No. R9-2003-270.

2.1. Violation of Basin Plan Prohibition No. 1

From January 24, 2003 through March 10, 2003, Pioneer Builders, Inc. caused or threatened to cause a condition of pollution, contamination, or nuisance in violation of Basin Plan Waste Discharge Prohibition No. 1.

2.2. Failure to Implement a Storm Water Pollution Prevention Plan

Between March 10, 2003 and April 15, 2003 Pioneer Builders, Inc. failed to develop and implement adequate erosion and sediment control best management practices in violation of Special Provisions for Construction Activity C.2 of Order No. 99-08-DWQ.

2.3. Failure to Comply with Cleanup and Abatement Order No. R9-2003-158

Pioneer Builders, Inc. failed to submit a complete section 401 Water Quality Certification application by April 18, 2003 in violation of Directive No. 5 of Cleanup and Abatement Order No. R9-2003-158.

2.4. Failure to File Notice of Intent

Pioneer Builders, Inc. failed to file a Notice of Intent for coverage under Order No. 99-08-DWQ from March 10, 2003 through April 10, 2003 in violation of California Water Code Section 13373 and Order No. 99-08-DWQ.

3. BACKGROUND

The Pioneer Builders, Inc. site is an 8-unit subdivision called Castillo del Mar in the Capistrano Beach community of the City of Dana Point. It is an infill project surrounded by an existing residential development. The site is tributary to the Pacific

Ocean at Capistrano State Beach via the municipal separate storm sewer system. In January 2003 the Regional Board received a complaint alleging urban runoff had contaminated soil on the site. As part of the investigation, it was discovered that construction had begun and that discharges of fill material to waters of the United States/State may have been conducted without notification required by the California Water Code.

The Regional Board visited the site on January 22 and January 24, 2003 to determine whether coverage under Order No. 99-08-DWQ would be necessary and whether waters of the State may have been impacted by the discharge of fill. Concerns regarding the lack of adequate erosion and sediment control were shared with the City of Dana Point, which subsequently issued an enforcement order until best management practices were improved to the satisfaction of the City. On February 4, 2003 the U.S. Army Corps of Engineers (USACE) determined that a waters of the United States had been filled and that notification and mitigation per Clean Water Act Section 404 would be required. Because the USACE determined that a Clean Water Act Section 404 permit is required for the project, a section 401 water quality certification demonstrating that the activity complies with all applicable water quality standards, limitations, and restrictions is required from the Regional Board.

Between February and April 2002, the developer and its representatives were in contact with the Regional Board regarding requirements of the section 401 certification. Despite repeated requests from the Regional Board during that time, no 401 application, site plan, or mitigation plan was submitted to the Regional Board despite assurances from the developer that they would be.

At the April 9, 2003 Regional Board meeting, concerned citizens spoke during the public forum about their concerns that the project was proceeding without proper permits. At the time of the April 9, 2003 Regional Board meeting, neither a 401 application nor Notice of Intent for coverage under the statewide Construction Storm Water Permit had been provided by the developer.

4. DETERMINATION OF ADMINISTRATIVE CIVIL LIABILITY

4.1. Factors to be Considered When Determining Administrative Civil Liability

California Water Code §13351 requires the Regional Board to consider several factors when determining the amount of civil liability to impose. These factors include: "...the nature, circumstance, extent and gravity of the violations, whether a discharge is susceptible to cleanup or abatement, the degree of toxicity of a discharge, and, with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and such other matters as justice may require."

4.1.1. Violation of Basin Plan Waste Discharge Prohibition No. 1

4.1.1.1. Nature, Circumstance, Extent, and Gravity of the Violation

On or before January 24, 2003, Pioneer Builders Inc. caused and/or permitted the clearing of vegetation, grading and the discharge of sand, silt, rocks, and debris into an unnamed creek. These activities obstructed the surface flow and eliminated the ability of the creek to support water quality functions impacting beneficial uses. In addition, a discharge of sediment from the site to the municipal separate storm sewer system was photo-documented by a third party and provided to the Regional Board on February 25, 2003.

The Basin Plan was adopted by the Regional Board on September 8, 1994. Waste Discharge Prohibition No. 1 of the Basin Plan states that the discharge of waste to waters of the state in a manner causing, or threatening to cause a condition of pollution, contamination, or nuisance as defined in California Water Code section 13050, is prohibited. California Water Code section 13050 defines "pollution" as an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following: (a) the waters for beneficial uses; (b) facilities which serve these beneficial uses.

Construction activities prior to and concurrent with the fill of the on-site waters, including clearing of vegetation and grading of lands adjacent to the on-site waters of the state, threatened to cause a condition of pollution by removing material that affected the quality of the on-site water and ability to support the WILD, WARM, and REC-2 beneficial uses. During site preparation activities for development of the subdivision, Pioneer Builders placed fill within the channel that resulted in the elimination of the channel and its ability to support water quality functions and beneficial uses.

4.1.1.2. Susceptibility to Cleanup and Abatement

The creek running through a portion of the construction site that was cleared of vegetation, graded and filled with sand, silt, rocks, and debris will not be restored to its original state. Mitigation of the discharge can be achieved however, and is required to be achieved by Cleanup and Abatement Order No. R9-2003-0158 which was issued by the Regional Board on April 11, 2003..

Discharges of sediment once in receiving waters are difficult to remove without widespread disturbances of native flora and fauna. Discharges to roads and neighboring properties are easier to cleanup, however due to the nature of sediment, complete cleanup can be very difficult.

4.1.1.3. Degree of Toxicity of the Discharge

While the discharge of sediment can be harmful to both flora and fauna living in the receiving waters, sediment, as well as construction debris is not considered toxic.

4.1.1.4. Voluntary Cleanup Efforts Undertaken

The Regional Board has received no information regarding voluntary cleanup efforts taken by Pioneer Builders, Inc. with regards to the sediment discharges. Cleanup and Abatement Order No. R9-2003-158 has required cleanup and mitigation of environmental damage caused by the unpermitted fill activities.

4.1.1.5. Ability to Pay and Continue in Business

At this time, the Regional Board has no information that Pioneer Builders, Inc. is unable to pay the proposed administrative civil liability (ACL) or how payment of the proposed ACL would affect the ability of Pioneer Builders, Inc. to remain in business.

4.1.1.6. Prior History of Violation

The Regional Board is not aware of any past violations by Pioneer Builders, Inc prior to this incident. This incident alone encompasses violations ranging from failing to file for a Notice of Intent for coverage under the general construction storm water permit, failing to file a section 401 water quality certification application, causing a condition of pollution and nuisance, discharging sediment into the municipal separate storm sewer system, and failing to implement adequate sediment and erosion control best management practices while conducting unpermitted construction activities.

4.1.1.7. Degree of Culpability

Pioneer Builders, Inc. bears full responsibility for understanding and fully complying with all applicable

regulatory requirements relating to construction activities. As a result, Pioneer Builders, Inc. has a high degree of culpability with regards to this violation.

4.1.1.8. Economic Benefit Resulting from the Violation

The Regional Board has no specific information regarding the economic benefit enjoyed by Pioneer Builders, Inc. with regards to this violation.

4.1.1.9. Other Matters as Justice May Require

Over the course of dealing with Pioneer Builders, Inc. regarding this matter, the Regional Board has expended an estimated 100 hours to investigate and prepare enforcement documents. At an average rate of \$90 per hour, the total investment by the Regional Board is \$9,000.

4.1.2. Failure to Implement a Storm Water Pollution Prevention Plan from March 10, 2003 through April 15, 2003

4.1.2.1. Nature, Circumstance, Extent, and Gravity of the Violation

During site inspections on January 22 and January 24, 2003 the Regional Board observed construction activities at the Castillo del Mar construction site without adequate sediment and erosion control best management practices. The City of Dana Point was notified of these concerns and subsequently issued an enforcement order to Pioneer Builders requiring them to improve conditions at the site.

On February 25, 2003, the Regional Board was provided photo-documentation from a third-party that depicted the discharge of sediment laden storm water off the site and into the street, part of the municipal separate storm sewer system. On March 15, 2003 additional photo-documentation was provided to the Regional Board that appeared to depict sediment-laden water entering the on-site storm drains.

On March 24, 2003, the Regional Board inspected the site and observed residual sediment in the adjacent street and sidewalk by the site entrance and residuals around the on-site storm drain inlet, indicating that the sediment and erosion control best management practices on-site were inadequate.

From the time Order No. 99-08-DWQ required the site to be in compliance with the requirements, March 10, 2003, and the last inspection on March 24, 2003, the Regional Board has determined that sediment and erosion control best management practices were inadequate to prevent sediments from leaving the construction site and entering the municipal separate storm sewer system and waters of the State.

4.1.2.2. Suceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.2.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.2.4. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.2.5. Ability to Pay and Continue in Business

See section 4.1.1.5.

4.1.2.6. Prior History of Violation

See section 4.1.1.6.

4.1.2.7. Degree of Culpability

Pioneer Builders, Inc. bears full responsibility for implementing adequate best management practices to minimize the effects of storm water discharges from its construction site. Because the Regional Board notified Pioneer Builders, Inc. well in advance of the State Water Resources Control Board's (State Board) March 10, 2003 deadline for construction sites greater than one acre to comply with the requirements of Order No. 99-08-DWQ, Pioneer Builders, Inc. has a high degree of culpability for failing to implement an adequate storm water pollution prevention plan.

4.1.2.8. Economic Benefit Resulting from the Violation

The Regional Board estimates that adequate sediment and erosion control best management practices on a typical construction site averages approximately \$2,000 per acre.

However, at a two-acre site it is anticipated that the cost of implementing adequate best management practices is significantly higher than \$2,000 per acre. However, the Regional Board has no specific information regarding the possible economic benefit enjoyed by Pioneer Builders, Inc. from this violation.

4.1.2.9. Other Matters as Justice May Require

See section 4.1.1.9.

4.1.3. Failure to Comply with Cleanup and Abatement Order No. R9-2003-158

4.1.3.1. Nature, Circumstance, Extent, and Gravity of Violation

Cleanup and Abatement Order No. R9-2003-158 was issued to Pioneer Builders, Inc. on April 11, 2003 in response to the discharge of pollutants and/or fill to waters of the United States without submitting an application for section 401 water quality certification. The Cleanup and Abatement Order required Pioneer Builders, Inc. to initiate efforts to cleanup and abate the effects of the unauthorized discharge, restore lost beneficial uses, mitigate environmental impacts associated with the discharge activity, and to obtain all required permits for the construction activity.

Directive No. 5 of Cleanup and Abatement Order No. R9-2003-158 requires Pioneer Builders, Inc. to submit a complete application for section 401 water quality certification application and a report of waste discharge by April 18, 2003. Pioneer Builders, Inc. failed to submit the anticipated section 401 water quality certification application and report of waste discharge until May 20, 2003, thirty-two days late.

4.1.3.2. Suceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.3.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.3.4. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.3.5. Ability to Pay and Continue in Business

See section 4.1.1.5.

4.1.3.6. Prior History of Violation

See section 4.1.1.6.

4.1.3.7. Degree of Culpability

Pioneer Builders, Inc. was issued Cleanup and Abatement Order No. R9-2003-158 on April 11, 2003. Pioneer Builders, Inc. requested and participated in a public hearing on the issuance of Cleanup and Abatement Order No. R9-2003-158 on May 14, 2003. At the public hearing, Pioneer Builders, Inc. requested revisions to some of the directives contained in the Cleanup and Abatement Order but did not request any modifications to the due date for submittal of a complete section 401 water quality certification application and report of waste discharge.

Clearly Pioneer Builders, Inc. was aware of the April 18, 2003 deadline and knowingly failed to meet the required due date. As a result, Pioneer Builders, Inc.'s degree of culpability with regards to this violation is high.

4.1.3.7. Economic Benefit Resulting from the Violation

Pioneer Builders, Inc. probably did not enjoy a significant amount of economic benefit from failing to meet the deadline of Cleanup and Abatement Order No. R9-2003-158.

4.1.3.8. Other Matters as Justice May Require

See section 4.1.1.9.

4.1.4. Failure to File Notice of Intent

4.1.4.1. Nature, Circumstance, Extent, and Gravity of Violation

On December 8, 1999 the State Board amended Order No. 99-08-DWQ requiring construction sites with soil disturbance one acre or larger to file a Notice of Intent for coverage under

Order No. 99-08-DWQ. Previously, only sites with soil disturbance greater than 5 acres were required to obtain coverage under Order No. 99-08-DWQ. The requirement to include the one to five acre parcels was scheduled to take effect on March 10, 2003.

On January 22, 2003 the Regional Board inspected the Pioneer Builders, Inc. two-acre construction site identified as Castillo del Mar. During the inspection the Regional Board informed the on-site supervisor that coverage under the statewide construction permit was required. Pioneer Builders, Inc. failed to comply with the Regional Board's directive to file an Notice of Intent and a Notice of Violation was issued on April 7, 2003. On April 11, 2003 the Notice of Intent was submitted by Pioneer Builders, Inc.

4.1.4.2. Suceptibility to Cleanup and Abatement

This factor does not apply to this violation.

4.1.4.3. Degree of Toxicity of the Discharge

This factor does not apply to this violation.

4.1.4.4. Voluntary Cleanup Efforts Undertaken

This factor does not apply to this violation.

4.1.4.5. Ability to Pay and Continue in Business

See section 4.1.1.5.

4.1.4.6. Prior History of Violations

See section 4.1.1.6.

4.1.4.7. Degree of Culpability

Pioneer Builders, Inc. was notified by the Regional Board on January 22, 2003 that they were required to submit a Notice of Intent for coverage under Order No. 99-08-DWQ. Pioneer Builders, Inc. failed to file the Notice of Intent by the State Board's deadline of March 10, 2003. Not until after the Regional Board issued a Notice of Violation on April 7, 2003 did Pioneer Builders, Inc. submit the application and filing fee. As a result, Pioneer Builders, Inc. has a high degree of

culpability with regards to this violation.

4.1.4.8. Economic Benefit Resulting from the Violation

The Regional Board anticipates that Pioneer Builders, Inc. enjoyed limited economic benefit from this violation. Submittal of a Notice of Intent encompasses downloading a form, filling it out and sending the \$700 filing fee, which would afford little room for economic benefit.

4.1.4.9. Other Matter as Justice May Require

See section 4.1.1.9.

4.2. Maximum Civil Liability

Pursuant to California Water Code Section 13385 the maximum civil liability that the Regional Board may assess is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and (b) ten dollars (\$10) for every gallon discharged, over one thousand gallons discharged, that was not cleaned up. California Water Code Section 13385(e) requires that, when pursuing civil liability under California Water code Section 13385, "At a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation."

Pursuant to California Water Code Section 13350 the maximum civil liability that the Regional Board may assess is five thousand dollars (\$5,000) per day of violation. When there is a discharge, and a cleanup and abatement order is issued, the civil liability shall not be less than \$500 per day.

4.2.1. Violation of Basin Plan Waste Discharge Prohibition No. 1

Pioneer Builders, Inc. caused or threatened to cause a condition of pollution, contamination, or nuisance in violation of Basin Plan Waste Discharge Prohibition No. 1 between January 24, 2003 and March 10, 2003. The total number of day of violation is forty-six days. Therefore, the maximum civil liability that could be assessed for this violation is two hundred thirty thousand dollars (\$230,000).

4.2.2. Failure to Implement a Storm Water Pollution Prevention Plan

Between March 10, 2003 and April 15, 2003 Pioneer Builders, Inc. failed to implement an adequate storm water pollution prevention plan by failing to implement adequate erosion and sediment control best management practices at the Castillo del Mar construction site. The total number of days of violation for this measure of liability is thirty-six

days. Therefore the total maximum civil liability that could be imposed for this measure of liability is thirty six thousand dollars (\$36,000).

4.2.3. Failure to Comply with Cleanup and Abatement Order No. R9-2003-158

Pioneer Builders, Inc. failed to comply with Directive No. 5 of Cleanup and Abatement Order No. R9-2003-158 by failing to submit a section 401 water quality certification application and report of waste discharge by April 18, 2003. The total number of days of violation for this measure of liability is thirty-three days. Therefore the maximum civil liability that could be imposed for this violation is one hundred sixty five thousand dollars (\$165,000).

4.2.4. Failure to File a Notice of Intent

Pioneer Builders, Inc. failed to file a Notice of Intent from the Castillo del Mar construction site from the time required by Order No. 99-08-DWQ, March 10, 2003 through April 10, 2003. The maximum number of days of violation is thirty-two days. Therefore, the maximum civil liability which could be imposed by the Regional Board for this measure of liability for these violations is thirty two thousand dollars (\$32,000).

4.2.5. Total Maximum Civil Liability

The total maximum liability that could be imposed by the Regional Board for the violations addressed in Complaint No. R9-2003-270 is four hundred sixty three thousand dollars (\$463,000).

4.3. Proposed Civil Liability Per Violation

The proposed amount of civil liability attributed to each violation was determined by taking into consideration the factors discussed in section 4.1, as well as the maximum civil liability that the Regional Board may assess as discussed in section 4.2.

4.3.1. Violation of Basin Plan Waste Discharge Prohibition No. 1

Pioneer Builders, Inc. caused or threatened to cause a condition of pollution, contamination, or nuisance from January 24, 2003 through March 10, 2003. The total number of days of violation is forty-six days. The liability for this measure of liability is one thousand five hundred dollars per day (\$1,500) for a total liability of sixty six thousand dollars (\$66,000).

4.3.2. Failure to Implement a Storm Water Pollution Prevention Plan

Pioneer Builders, Inc. failed to implement an adequate storm water pollution prevention plan by failing to implement adequate best management practices in violation of Special Provisions for Construction Activity C.2 of Order No. 99-08-DWQ from March 10, 2003 and April 15, 2003. As a result, the liability for this measure of liability for thirty six days of violation is one thousand dollars per day (\$1,000) for a total liability of thirty six thousand dollars (\$36,000).

4.3.3. Failure to Comply with Cleanup and Abatement Order No. R9-2003-158

Pioneer Builders, Inc. failed to comply with Directive No. 5 of Cleanup and Abatement Order No. R9-2003-158 by failing to submit a complete section 401 water quality certification application and a report of waste discharge from April 18, 2003 until May 20, 2003 for a total of thirty three days of violation. The liability for this measure of liability for thirty-three days of violation shall be one thousand dollars per day (\$1,000) for a total of thirty three thousand dollars (\$33,000).

4.3.4. Failure to File a Notice of Intent

Pioneer Builders, Inc. failed to file a Notice of Intent by March 10, 2003, after receiving prior verbal notification by the Regional Board during a January 22, 2003 inspection. The Notice of Intent was not submitted until after a Notice of Violation was issued by the Regional Board. The Notice of Intent was submitted on April 11, 2003. As a result, the liability for this measure of liability for thirty-two days of violation shall be one hundred fifty dollars per day (\$150) for a total of four thousand eight hundred dollars (\$4800).

4.4. Total Proposed Administrative Civil Liability

The total proposed civil liability in this matter is one hundred fifty nine thousand eight hundred dollars (\$139,800).